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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN BEJAR MELGOZA, Defendant and Appellant.	H023236 (Santa Cruz County Super. Ct. No. F01320)

A jury convicted appellant of one count of murder, one count of discharging a firearm at an occupied motor vehicle, one count of discharging a firearm from a motor vehicle, and four counts of conspiracy related to these acts. (Pen. Code, §§ 187, 246, 12024, subd. (d), 182, subd. (a)(1).) The jury found true special allegations that appellant personally used a firearm, that he inflicted great bodily injury, and that the crimes were gang related. (Pen. Code, §§ 12022.5, 12022.53, subds. (b), (c) & (d), 186.22, subd. (b)(1).) The trial court sentenced appellant to imprisonment for 52 years to life. Appellant contends his arrest was a violation of his Fourth Amendment rights and his incarceration without bail was a denial of due process because the magistrate who issued the arrest warrant and subsequently denied his application for bail was not neutral or detached. He contends he was denied his rights to confrontation and to due process because the trial court admitted a large quantity of hearsay evidence that appellant argues

was inadmissible. He contends that the trial court erred in admitting certain pretrial statements of witness Oscar Macias and the results of a voice stress analyzer test. Appellant contends the notice of the firearm enhancements was insufficient, the enhancements were not properly pled and proven, and the court erred in imposing an enhancement for personal infliction of great bodily injury. Appellant further contends the court erred in imposing a two-year enhancement term for criminal gang activity pursuant to Penal Code section 186.22, subdivision (b)(1). We agree with appellant's contention regarding the section 186.22 gang enhancement and affirm the judgment as modified.

EVIDENCE AT TRIAL

On August 23, 1998, around 10 p.m., Alejandro Lopez sat in his parents' red Camaro talking with his girlfriend, Esmeralda Sanchez. They were parked in a vacant parking lot next to the Kennedy Youth Center in Watsonville. A pickup truck with two people inside drove by them, slowed, and drove to the back of the parking lot. The truck then returned, pulling up next to the driver's side of the Camaro. The passenger began talking to Lopez in Spanish, asking him if he had any marijuana. Lopez said he did not. The passenger asked Lopez his name, and Lopez responded, "Alex." The passenger in the truck asked Lopez "Que eres," which Sanchez understood to mean "what gang are you from." Lopez replied he was not anything, meaning he was "not part of any gang" and that he was just there talking with his girlfriend. Sanchez was frightened, and glanced at the passenger. She was slumped down between the bucket seats huddled closely to Lopez. Sanchez heard the passenger repeat "que eres," and three rapid gunshots. Lopez was hit twice in the torso, perforating his heart, and once in the wrist. He started the car and drove in reverse, crashing into the wall of the Kennedy Youth Center. Sanchez tried to drive the car but could not move it. The truck left the parking lot.

Sanchez ran across the street to a pay telephone and called 911. Deputy sheriffs arrived as she spoke to the dispatcher, followed by paramedics and the police. Lopez

died at the scene. Sanchez was crying hysterically and covered in blood. The sheriff's deputies interviewed her briefly at the scene and then at the sheriff's office in Santa Cruz. Sanchez described the passenger in the truck and the truck with a distinctive primer spot. The next day, she worked with a sheriff's sketch artist to prepare a composite sketch of the shooter. When they finished, Sanchez was positive that it accurately portrayed the passenger.

Sheriff's deputies found three expended cartridges at the scene consistent with a .22 caliber weapon, all of which had similar characteristics, indicating they were fired from the same gun.

On August 24, a truck was found abandoned on the roadside south of Watsonville. The truck had Michigan license plates and had been hot-wired. Sanchez thought the primer spot on this truck looked like the one she had seen on the truck the night of the shooting. Fresh peach pits were scattered around the truck. A sheriff's deputy found one unexpended .25 caliber round lying on the truck's right floorboard. Another .22 caliber bullet was lying on the ground outside the truck on the driver's side. This bullet had damage to its head suggesting that the weapon had jammed when an attempt was made to fire it. The truck was eventually returned to its owner who testified at trial that she parked it on the evening of August 22 and noticed it missing the following evening. When it was returned to her, the passenger side window was broken. The truck owner did not own any guns and kept no bullets in the truck. Sheriff's deputies had observed this truck at the Buena Vista labor camp around noon on August 23. Several Hispanic males were around the truck.

A police gang expert testified at trial that the Poorside Watsonville gang (PSW) was a Sureno gang with about 50 members. Surenos use the numbers three and 13 as

symbols.[1] The expert testified PSW was loosely organized and many of the members were heroin addicts. He said the shooting at the Kennedy Youth Center was probably for the benefit of the PSW gang. The expert identified PSW members' involvement in two predicate, violent criminal assaults. A gang member testified no gang member wants to be known as a "rat" or a "snitch."

On August 28, 1998, sheriff's investigators interviewed Juan Carlos "Flaco" Rocha. Rocha was in jail for a parole violation charge, and offered to trade information about the Lopez murder in exchange for his freedom. Rocha was 27 years old and had been a member of the PSW gang since he was 15. Rocha told the deputies that a fellow PSW gang member had stolen a truck from Santa Cruz. He said he had heard the truck was used in a drive-by shooting. He said "Shyboy" from the Buena Vista labor camp stole the truck.

"Shyboy" is Rafael Bernabe, who was arrested August 30, 1998. Officers found property they believed was stolen from the truck at his residence. Bernabe admitted stealing the truck, and his palm print was on the broken passenger's side window. He said he abandoned it in Watsonville around 4:00 p.m. on August 23, 1998. On September 1, 1998, Sanchez attended a lineup that included Bernabe. She was unable to identify him. She did circle one person's number as resembling the passenger, but did not think that person was actually the passenger. Bernabe did not look like the passenger to her. Appellant was not in the lineup.

In the days after the shooting, Sanchez's sister, Alma Pinon talked to Sanchez about the Lopez murder. Pinon knew that she and Sanchez had a half-brother from their father's affair with another woman. The half-brother was Mario "Shaggy" Rodriguez and Pinon knew he associated with PSW gang members. Pinon went looking for Rodriguez,

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[1] When appellant was questioned by the police, he described his tattoos, but did not mention that he had three dots tattooed on the inside of his ring finger.

eventually running across him at the YMCA. She asked him if he knew anything about the Lopez killing. He said that he did, but that he did not want to tell her about it there. He agreed to meet with her and Sanchez later.

On September 5, 1998, in a shopping mall parking lot, Pinon and Sanchez parked their van in the back so fewer people could see them. Rodriguez arrived and got in the back seat. Pinon introduced Rodriguez to Sanchez, who did not know him. Rodriguez said his mother had told him about what happened to Sanchez and Lopez. At trial, Pinon testified "then [Rodriguez] said that he knew who had done it." Sanchez and Pinon offered Rodriguez $2,000 to tell them what he knew about the killing and offered to help him "get out of Watsonville." Pinon testified Rodriguez said "that he didn't want the money, that the money was nothing for him, that we were his sisters, we were his blood, and he cared more about us than what he cared about them." Rodriguez kept looking nervously out the windows of the van. He made his half-sisters promise that they would not identify him to the authorities.

Pinon testified Rodriguez told them there had been a "junta," a gang meeting. A hat was passed to collect money to buy a gun to do a "jale" or job Three people wanted to show "they were down for the barrio." A truck had been stolen the night before. Pinon testified Rodriguez mentioned three names, including "Gonzo" and the first name "Adrian." Later, Sanchez believed Rodriguez had told them that appellant had been the shooter, but Pinon testified she did not remember whether Rodriguez said how each of the three was involved. Sanchez testified Rodriguez told them he saw appellant with a gun and that appellant had been "the passenger in the truck the day of the shooting." He told them he did not know who had been the driver.

Pinon testified concerning a statement Rodriguez attributed to appellant. On August 30, 1998, Sanchez had attended a public remembrance and mural dedication for victims of gang violence, including Lopez, at the Mona Lisa restaurant in Watsonville. Pinon testified Rodriguez told Sanchez and Pinon that he was at the Mona Lisa with

appellant at the remembrance, and appellant said, referring to Sanchez, "She's going down. The bitch is going down."

After consulting with Sanchez and Pinon, Sanchez's brother-in-law contacted the sheriff's department and said Sanchez had a source from within the PSW gang who had identified Lopez's killer. On September 10, 1998, sheriff's deputies contacted Sanchez, but she initially refused to divulge the name of her informant. Eventually, Sanchez told the deputies that the killer's name was Adrian, that his nickname was "Gonzo," and that her informant had seen him with a gun. She gave the deputies an address that matched appellant's. She told them her half-brother Rodriguez had provided the information.

On September 10, 1998, appellant, Adrian "Gonzo" Melgoza, was arrested on a warrant for violating probation by associating with gang members. He was interviewed the same day and said he did not recall where he was on Sunday, August 23. He denied any knowledge of or involvement with the homicide. He denied he was a member of the PSW gang or that he had friends who were members. Appellant agreed to participate in a lineup, but Sanchez was "too upset" to go through with it.

On September 17, Sanchez did view a lineup including appellant. She said the shooter had a mustache and appeared thinner than anyone she saw. She later told detectives that appellant and another person looked like the composite sketch. At trial, Sanchez testified that appellant resembled the composite sketch, but she did not identify him as the passenger in the truck. A forensic animation specialist prepared an exhibit using a booking photograph of appellant with a transparency of the composite sketch of the suspect as an overlay. The similarities between the facial features in the sketch and the features in the photo became stronger and stronger as the level of comparison increased. A defense identification expert gave reasons why this was an unreliable technique and said there were notable differences between appellant's face and the features of the composite.

The police contacted Rodriguez and interviewed him once at a juvenile camp and again at the sheriff's office. In these interviews, Rodriguez said the PSW gang held a junta late in the afternoon on August 23, 1998. He said about 20 people attended. At trial, Rodriguez testified the group was determining how to "get payback" from the Nortenos. A hat was passed to collect money for people in jail. Rodriguez said that at a smaller meeting held immediately after the junta, he, appellant and Bernabe discussed the plan, and appellant was the initiator and lead person carrying out the shooting. Rodriguez said appellant produced a gun and said he wanted to use Bernabe's stolen truck to do the jale. In the interviews, Rodriguez said appellant was the only one who had a gun and denied knowing who the driver was. He said he saw two guns in socks that had been hidden in a pipe under the train trestle. Later, investigators found a sock with a magazine loaded with .22 caliber ammunition near the described location.

Rodriguez later told an investigator that Alejandro "Baby" Ramirez, rather than appellant, was the initiator of the plan to do the shooting. Later, Rodriguez said Michael "Shadow" Ramirez was involved and, in April 2000, Rodriguez said Oscar "Blue Eyes" Macias was involved in planning the jale.

Rodriguez was granted full transactional immunity and testified at trial that appellant was part of the small group that planned the shooting and that appellant agreed to assist. He testified they were smoking marijuana and he was "pretty high." Rodriguez testified he did not mention Alejandro "Baby" Ramirez's involvement as the instigator at the jale to the police or during testimony in November 1998. [2] He said Ramirez said he wanted to do a "jale," which has "lots of meanings" including a robbery or a drug deal.

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[2] Late in 1998, Bernabe and appellant were charged with the Lopez homicide. At the close of the prosecution's case-in chief, the court granted a Penal Code section 1118.1 motion for acquittal of Bernabe. Apparently, that jury was then unable to reach a verdict as to appellant. Later, severed co-defendant Alejandro "Baby" Ramirez was acquitted at a separate trial.

He said "Gonzo went with his idea . . . agreed with him." He testified that Juan "Happy" Fernandez told them they should have a plan and Bernabe volunteered his recently stolen truck. Alejandro "Baby" Ramirez then produced two guns "from some bushes." The guns were in socks. Ramirez picked up one and appellant the other. Rodriguez testified that when the meeting broke up, he and Oscar "Blue Eyes" Macias put gas in the stolen truck. Rodriguez admitted during his testimony that everything he testified to at this trial that Ramirez did Rodriguez had previously attributed to appellant in statements to the authorities and prior testimony.

Rodriguez testified that inside the van in the shopping center parking lot he told his sisters "who did it." He testified that he told them "Adrian" did it, that Adrian's nickname was "Gonzo," and that he saw him with a gun. Rodriguez identified appellant in court as "Gonzo." Rodriguez testified that he told his sisters about the junta and about seeing appellant with a gun there. He testified he told them that he thought appellant had committed the homicide. He denied saying anything about a hat being passed and did not remember mentioning to them that a stolen truck would be used.

In late September 1998, Juan "Flaco" Rocha was arrested and told by sheriff's deputies that he could help them with their murder investigation by going to a Sureno unit of the jail and listening to people talk. Rocha was using heroin daily and did not want to be returned to prison for his parole violations. He agreed to help. When he met with a sheriff's deputy a few days later, the "first thing" Rocha asked about was "what was going on with his parole." The deputy said he had not talked to Rocha's parole agent yet because "I gotta know what you have." Rocha told the investigators that appellant had confessed to the Lopez shooting. He said appellant told him he had done a jale using a truck stolen by Bernabe. He said appellant told him he "found someone parked and shot them." Rocha told the investigator appellant said he and another person got out of the truck, and that .38 caliber weapons were used. He said appellant said that there was a female in the car and he would have shot her except the gun jammed. He said appellant

told him they left the Kennedy Youth Center when they heard the sound of the ambulance. The information concerning the gun jamming was the first the detectives had heard of this. Rocha told the investigator that appellant referred to Lopez as a "buster," a derogatory term for a Norteno gang member. Rocha was sent to a drug treatment program rather than being returned to prison, but he left the program within two days of the placement.

At trial, Rocha testified that what he told the detectives was what he had heard from others and not from appellant. He testified appellant did not confess to him. Rocha's parole agent testified regarding Rocha's parole violations and that his parole hold was dropped in October 1998 after a sheriff's department official said he was providing useful information to them.

In October 1998, the police searched the home of Michael "Shadow" Ramos and found many rounds of .25 and .22 caliber ammunition. Juan "Little Man" Macedo, a PSW gang member, said that he went to the lake with Alejandro "Baby" Ramirez and Ramos and that Ramos had retrieved a .25 caliber handgun from the lake. Ramos told the police he had thrown the gun into the lake because his friends were being arrested for a homicide and he did not want to get caught with the gun.

In November 1998, testifying before an investigative grand jury, Oscar "Blue Eyes" Macias denied knowing appellant and denied knowing anything about the Lopez shooting. He admitted there had been the PSW meeting on August 23, 1998. Later, after being further interviewed by detectives administering a voice stress analyzer test, Macias told the grand jury that, when the August meeting broke up, appellant told him he was going to do a drive-by shooting. At trial, Macias was granted full transactional immunity for his role. He testified that he lied to the police and told them what they wanted to hear because they were going to send him to prison if he did not implicate appellant. However, he also testified he would never "rat" against his friends unless it was true.

PSW member Jesus "Baby Face" Sandoval testified that a few days before the junta, his cousin Juan "El Charro" Ramirez was attacked and beaten by a group of rival Norteno gang members at a birthday party at the Kennedy Youth Center. Other gang members mentioned several names as the people who were attacked, but appellant's name was not mentioned.

The owner of Buena Vista Farms in Watsonville testified that his records showed appellant was at work picking strawberries by 7:00 a.m. Monday, August 24. Appellant's father testified that Alejandro "Baby" Ramirez got appellant the job and drove appellant to work. Other testimony established appellant acted normally after he was released from jail on another matter in August 1998 up until his arrest in September and did not change his appearance. The members of the Melgoza family were agricultural laborers, and bedtime was around 10:00 p.m. so they could arise in the morning for work. Ten people lived in their one bedroom apartment to which the children did not have keys.

Appellant's 14-year-old sister testified she had seen her brother with his cousin Alex sitting on the stairs out in front of their home during the afternoon of August 23, 1998. He was there when she and her mother left for Mass at 6:20 p.m. He was out of her sight for a couple of hours that afternoon, and she did not know where he was around 10:00 that evening.

MOTIONS TO SUPRESS AND DISMISS

Introduction

Appellant contends, "The magistrate who issued the arrest warrant for appellant and subsequently denied his applications for bail was neither neutral nor detached, and therefore appellant's arrest was in violation of the Fourth Amendment and his incarceration without bail was a deprivation of his Fifth and Fourteenth Amendment rights to due process of law."

Appellant bases these contentions on the circumstances surrounding his arrest and incarceration for a five-month-old probation violation. Wishing to question appellant

about the Lopez homicide, Sergeant David Deverell in the homicide division of the Santa Cruz County Sheriff's Department sought a probation violation arrest warrant from the Honorable Heather Morse, a municipal court judge in Watsonville. Judge Morse's husband is Lieutenant Michael Lillis. Lt. Lillis is in charge of homicide investigations. Appellant was arrested on the probation violation warrant and questioned about the homicide. After Judge Morse denied appellant bail on the warrant, law enforcement authorities arranged to have the informant Rocha placed in appellant's cell. Appellant contends that evidence of his statements to the police and to Rocha and his identification by Sanchez in a jail lineup were obtained by exploitation of a violation of his right to a neutral and detached magistrate.

Hearing on the Motions

On October 23, 2000, appellant filed a motion to suppress and dismiss the charges against him pursuant to Penal Code section 1538.5. The motion sought to suppress evidence "obtained and seized by the Santa Cruz County Sheriff's Office on September 10, 1998, and October 8, 1998. [Appellant] also [sought] dismissal of the Information for denial of due process." The motion was brought "on the grounds that (1) the arrest on September 10, 1998, was illegal as the police violated defendant's Fourth Amendment rights when the arrest warrant used was not issued by a neutral and detached magistrate; and (2) the search of October 8, 1998 was an illegal probation search." When all the Santa Cruz County judges recused themselves, the Judicial Council assigned a judge from Stockton to hear the matter.[3]

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[3] Judge Morse recused herself from this case, Santa Cruz County Superior Court Case No. F01320, shortly after the filing of the criminal complaint in September 2000, and before the preliminary examination, stating, "My husband is in charge of the investigation of this case and may be a witness." Appellant's motion was directed at Judge Morse's involvement in the probation violation matter in September 1998 in Case No. W7-02122. Judge Morse made a motion through counsel for an order quashing appellant's subpoena of her for the hearing on these motions or, in the alternative "barring

At the beginning of the hearing on the motions, the trial court took judicial notice of a court file that shows that on November 21, 1997, appellant pleaded guilty to a misdemeanor charge of giving a false name to a police officer. (Pen. Code, § 148.9.) He received "a conditional sentence of twelve months from that date indicating that he was subject to search and seizure for weapons and that he was to stay away from Second Street in Watsonville, not to possess weapons or gang paraphernalia. Other conditions were imposed, including three days in the County Jail and a $100 restitution fine. He also was not to associate with any gang members."

Lt. Lillis testified that in 1998 he had an administrative assignment as the commander of the investigation division of the Santa Cruz County sheriff's department. He had worked for the sheriff's department for 27 years. He supervised six detective sergeants and 16 detectives, facilitating personnel assignments, balancing workloads and "mak[ing] sure the case agent has all the resources he or she needs to successfully investigate a case." In 1998, the division had roughly 50 to 60 active criminal investigations.

Lt. Lillis testified he had been married to Judge Morse, the judge in the Municipal Court in Watsonville, for 16 years. Lt. Lillis said that he and Judge Morse "made [it] a practice over the years that if there's a case that I feel may involve her court in any way, that we intentionally do not discuss these cases." For example, when Judge Morse was on-call to sign search warrants for sheriff's department personnel after hours, the subject was "taboo" in the household.

Late the night of August 23, 1998, Lt. Lillis received a call at home by the patrol sergeants concerning a homicide. Lt. Lillis "drove to the scene to ascertain if the case was being properly handled." He told Judge Morse he "was going out on a possible

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any inquiry into her mental processes while sitting as a magistrate." The defense later released Judge Morse from the subpoena.

murder case." He stayed there four hours and returned home. In the morning, he told Judge Morse that there had been a murder at the Kennedy Youth Center.

Sergeant Craig Wilson was assigned to the investigation. In the first three weeks after the homicide, Lt. Lillis received daily reports on the progress of the investigation. He worked late nights on the case during August and September and met with the detectives and the district attorney. Sgt. Wilson had a pre-planned vacation about a week after the homicide. He talked to Sgt. Deverell about substituting as lead investigator while Sgt. Wilson was away, and Lt. Lillis was made aware of this arrangement. When Sgt. Wilson returned, Sgt. Deverell continued to provide assistance as needed.

At the hearing on appellant's motions, Sgt. Deverell was asked, "have you ever socialized with Lieutenant Lillis or his wife, Judge Heather Morse?" He answered, "yes." Lt. Lillis testified he and Sgt. Deverell had worked together for about three years in his current assignment and "have had other occasions when we worked together." He and Sgt. Deverell had gone skiing together, but Judge Morse did not participate in those social events.

As the Lopez homicide investigation progressed, the PSW gang was suspected of involvement, and Rafael "Shyboy" Bernabe was arrested. In early September, appellant's name was mentioned as the killer. On September 10, 1998, the authorities learned that Esmeralda Sanchez had heard that appellant was her boyfriend's killer. That day, in the early afternoon, Sgt. Wilson and Detective Fred Plageman went to appellant's house, "to attempt to contact him and search it" but appellant was not there. Sgt. Wilson asked Sgt. Deverell to check county criminal records on appellant's previous gang involvement, his probation status, and whether he was subject to a probation search condition. Appellant had been placed on one year of conditional sentencing status, meaning no probation officer was assigned to his case. Sgt. Deverell learned that one of appellant's probationary terms was that he was not to associate with gang members. Sgt. Deverell found an April 1998 police report of an assault with a deadly weapon by a gang member

on a motorist and his wife. Appellant was named in the report as being in the company of two "known Poorside gang members." Sgt. Deverell and Sgt. Wilson discussed the matter and agreed a warrant would be sought.

Because the Watsonville court was the court with jurisdiction over the conditional sentence case, Sgt. Deverell called that court and spoke to the clerk concerning obtaining an arrest warrant for the probation violation warrant. Sgt. Deverell told the clerk he "wanted to speak to the judge . . . regarding a probation violation." The clerk put Judge Morse, who was the only judge in the Watsonville court at the time, on the phone. After exchanging pleasantries, Sgt. Deverell explained the facts of appellant's probation violation for his association with known gang members and asked the judge to violate appellant's probation and issue an arrest warrant. Sgt. Deverell testified, "At the time that we were looking at the probation violation, when it was Judge Morse that was the judge that we were dealing with, knowing that the lieutenant I work for is married to Judge Morse, I tried to minimize, if you will, the involvement of the probation case from our homicide case. I tried to keep the two separate." He did not tell Judge Morse anything about having an interest in appellant in connection with the homicide investigation, or a new criminal offense, or the plan to have appellant arrested that day. When asked if he told the judge this was an urgent matter, he testified, "Given that we were on the phone, I'm sure I expressed to her that I was looking to get the probation violation and the warrant in the system at that time, yes."

While on the phone, Sgt. Deverell overheard a conversation between the clerk and the judge as to whether bail should be set. The judge said she was going to set bail, "and her court clerk corrected her and indicated that it should be a no bail, that bail is not set on probation violations." At the hearing on appellant's motions, the trial court took judicial notice that the file contained a "post-it note" concerning the phone call that "there's a scratched out $50,000 and it says no bail."

Sgt. Deverell told Lt. Lillis "that they had developed some information that indicated that the suspect was in violation of the terms of his probation." Lt. Lillis testified he could not remember whether "they told me before or after they got the warrant, but they did tell me that they had gotten a bench warrant for this violation. . . . They told me they got it from Department 12, and at that time I knew that's where my wife was assigned, so I assumed it was her."

Late that afternoon, Sgt. Deverell learned that the no-bail warrant had been received by the Santa Cruz county jail. Within a half an hour of the warrant being issued, Det. Roy Morales, who was assigned to the Lopez homicide case, arrested appellant on the sidewalk outside his home. Appellant was taken to the Sheriff's Department for questioning.

That night Lt. Lillis left Judge Morse a message on their telephone answering machine telling her that he would be home late. When he arrived home, he told her that he "was working late on that case that we talked about before, the Kennedy Youth Center case."

During appellant's interview, Lt. Lillis was in his office, a very large room that contains a television monitor of the interview room where appellant was being questioned. Lt. Lillis testified, "I saw a little bit of [the interview]. I didn't really watch it, no. It seems like it was in Spanish." Sgt. Deverell prepared and signed a report of the conditional sentence violation, which Lt. Lillis reviewed when it was completed. Lt. Lillis signed the report on the bottom of the first page. Sgt. Deverell forwarded the report through interoffice mail to the district attorney and Judge Morse. It was "not specifically" a normal course of business for a report of an arrest to be forwarded to the judge.

Appellant was booked into a unit of the jail used for high profile cases. He was given his *Miranda* warnings and questioned a number of times, for a total of eight to 10 hours, concerning the Lopez homicide.

On September 14, 1998, Judge Morse called appellant's probation violation case and noted he had not been transported. She observed appellant was a public defender client and asked, "Would you like to go ahead and set a probation violation hearing date or do you wish to transport him tomorrow or another day?" After some discussion of discovery issues, the court continued the matter. At the next court date, appellant was present and represented by the public defender. Defense counsel noted, "it's unclear exactly what the violation is," observing "we don't have very much information." Defense counsel asked the court to release appellant on his own recognizance. The prosecutor objected, saying "This violation sounds quite serious and . . . he violated the 'no association with gang members,' and there may have possibly been weapons involved. There was gang paraphernalia seen by the officers, and this is a bit more serious." The prosecutor noted a prior probation violation in the file. Judge Morse stated, "That's what I notice. It's the second warrant issue[d] in the case; and because of that his OR is denied." Appellant remained in custody on the no bail warrant and the matter was set for October 8, 1998 for a probation violation hearing. The court file in the probation violation case shows a January 26, 1998 appearance in Watsonville before Judge Morse with a docket entry indicating, as the trial court described it, "failure to pay a fine, and it does state last chance. Next time, jail, and [appellant] was given $80 credit towards a fine and the balance of $123.00."

Meanwhile, on September 22, following an interview with Mario Rodriguez, Sgt. Deverell wanted to do some follow-up on the information Rodriguez had provided. As Lt. Lillis testified, "[t]here was a map where the guns at this meeting had been hidden, so Sergeant Deverell was going to go and look, and there was no one else available to go along with him, so I went ahead and accompanied him so that there would be at least two people to go down there to the location to look. It was a search."

On October 8, 1998 appellant appeared in court with the public defender on the probation violation. Defense counsel told Judge Morse "we're going to do exactly what

we discussed . . . . He's going to admit the violation of his probation and receive the 170 days plus credit." Judge Morse proceeded to take appellant's admission that he had "violated probation, specifically the no association clause" and sentenced appellant as defense counsel had outlined.

At the hearing on appellant's motions, Katherine Johnson testified she had worked as a courtroom clerk in Santa Cruz County for 10 years, and had had extended assignments with Judge Morse. At the time of the hearing, she was working for the Santa Cruz County Public Defender's Office. At the request of the defense, she reviewed six months worth of conditional sentence violations in Judge Morse's courtroom. Of the 323 conditional sentence violations handled by Judge Morse that were not for the commission of new offenses, there were 60 instances where no-bail was set for a conditional sentence violation, only one of which, appellant's case, involved something other than failure to do confinement. Appellant's was the only case on calendar for violating a non-association with gang members term.

Probation Officer Linda Smith testified that a person given a conditional sentence does not have a probation officer. She had handled numerous cases in Judge Morse's court in which non-association gang clauses resulted in probation revocations. Judge Morse routinely granted no-bail warrant requests in Watsonville. Former Probation Officer Bernie Rocha testified he dealt primarily with south county gangs, including PSW, and he would seek a no-bail arrest warrant when he found a violation of a non-association term. In his experience with Judge Morse, she would treat the violation of associating with other gang members as "a particularly serious violation."

The trial court reviewed the file in a case of a defendant named Guillermo Rodriguez who was charged with violating Penal Code sections 148 and 12020, "essentially the same as Melgoza's in case no. 02122," for a conditional sentence

violation that concerned gang involvement and found that the jail records reflected no bail was set at the arraignment by Judge Morse.[4]

In an eight-page written decision, the trial court denied both appellant's motion pursuant to Penal Code section 1538.5 and the motion to dismiss on due process grounds. The court summarized the evidence presented at the hearing on the motions. The court said, "[a] second look at Defendant's argument reveals the thrust of that argument is centered on the actions of Sgt. Deverell in obtaining the arrest warrant from Judge Morse." The court said, "any evidence offered that occurred after the arrest of defendant, Melgoza, is not relevant to this motion." The court determined "[t]he issues to be decided by this court are: Whether or not the warrant was issued by a 'neutral and detached magistrate'; and, Whether or not there was conduct by law enforcement that was unethical and therefore outrageous in actions to obtain the arrest warrant herein."

The trial court observed that Lt. Lillis and Judge Morse were "married for a long time prior to Judge Morse becoming a judge . . . [and] that prior to Judge Morse'[s] appointment to the bench they made it a point not to discuss their work . . . ." The court said, "This is not a situation that either enhances his career or, for that matter, his friendship with Sgt. Deverell whose independent choice of Judge Morse in his rush to get a warrant into the system triggered the ensuing responses."

The court stated, "In order to dispel neutrality of the Court in this matter the defense has the burden of presenting evidence that would prove by a preponderance that there was such a situation created by the issuance of this warrant that, but for the behavior of the parties to the warrant, the defendant would not have been arrested. In other words, that evidence must show behavior that is so counter to the usual routine of

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[4] Appellant points out that, in Rodriguez's probation violation, "[d]espite his prior record, formal probation, and the commission of a new offense, he received half as much jail time as appellant (90 days instead of 170) even though appellant was on conditional sentence, had no new offense, and had an insignificant criminal history."

investigating officers that it would render a result that could not have occurred absent the questionable conduct of the officer viz a viz the court." The court said a review of the probation violation case revealed the only difference between it and other warrant requests was that "this judge just happens to be married to the supervisor of the person requesting the warrant."

Discussion

Appellant contends that Judge Morse was not neutral and detached in issuing the warrant for his arrest because her marriage to Lt. Lillis created a conflict of interest under Code of Civil Procedure section 170.1 and violated the Fourth Amendment. Appellant argues that "[b]ecause the arrest warrant was issued in violation of the Fourth Amendment, and appellant's subsequent incarceration without bail in the [conditional sentence violation case] was in violation of his right to due process of law, all evidence obtained as the result of those constitutional violations must be suppressed." He seeks suppression of his statements to the jail informant Juan Rocha, his exculpatory statements to the police, and his identification by Esmeralda Sanchez in the jail line-up.

"[I]n ruling on a motion under section 1538.5 the superior court sits as a finder of fact with the power to judge credibility, resolve conflicts, weigh evidence, and draw inferences, and hence . . . on review of its ruling by appeal or writ all presumptions are drawn in favor of the factual determinations of the superior court and the appellate court must uphold the superior court's express or implied findings if they are supported by substantial evidence. [Citation.]" (*People v. Laiwa* (1983) 34 Cal.3d 711, 718.) The reviewing court then must measure the facts, as found by the trier, against the constitutional standard of reasonableness. (*People v. Leyba* (1981) 29 Cal.3d 591, 597.) In discharging that duty, this court exercises its independent judgment. (*Id*. at pp. 596-597.)

Appellant argues that the standard of review described above should not apply because "the court unfairly characterized the motion as challenging only the actions of

Sgt. Deverell in obtaining the arrest warrant from Judge Morse and Judge Morse's actions in issuing the no bail warrant." Appellant argues Judge Morse's actions before and after the warrant was issued were relevant to the question of her impartiality at the time the warrant was issued. Appellant urges, "the standard of review for this court is independent appellate review." The trial court correctly noted that both appellant's motion to suppress and his motion to dismiss were "based on factual bases that are intertwined" and therefore addressed them "simultaneously" in its written opinion.

An appellate challenge to a judge's failure to recuse himself or herself is subject to independent appellate review. (*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, at p. 319, citing *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 171.) Because appellant's due process claim compels an independent examination of Judge Morse's participation in this matter, and entails consideration of issues related to the asserted Fourth Amendment violation, we proceed to conduct an independent review.

The United States Supreme Court has held a neutral and detached magistrate is required by the Constitution. (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 453 [state attorney general in charge of investigation issued search warrant in capacity as justice of peace].) In *U.S. v. Leon* (1984) 468 U.S. 897, 914, the United States Supreme Court said, "the courts must . . . insist that the magistrate purport to 'perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.' "[5]

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[5] The court stated that "the [good faith] exception [to the exclusionary rule] we recognize today will . . . not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant." (*Leon, supra*, 468 U.S. at p. 923.) *Lo-Ji* involved a town justice who was contacted by law enforcement officers who wished him to declare two movies obscene so that they might be seized from the defendant's store. After approving a search warrant for the two films, the justice accompanied the officers to the defendant's premises. In the course of the search that followed, the justice approved the addition of hundreds more films and magazines to the existing search warrant following his review of those films. The Supreme Court

Code of Civil Procedure section 170.1 provides in relevant part: "A judge shall be disqualified if: . . . [¶] The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party . . . [or] a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (*Id*. at subds. (a)(4) & (a)(6)(C).)

Appellant argues that, "As Lt. Lillis was a party to any proceeding initiated by his subordinates to obtain a warrant, Judge Morse should have recused herself in this situation where a warrant was sought by a subordinate of Lt. Lillis. Additionally, in this case, there was the additional factor that the warrant was sought by a family friend. Reasonable individuals would speculate that Lt. Lillis's assignment of a close friend and colleague to an important murder case is exactly the sort of information he would have shared with his wife who presided over a courtroom that heard criminal cases. Accordingly, Judge Morse should have declined to participate in the issuance of the warrant because a reasonable member of the public might reasonably entertain a doubt that she could have impartially weighed a family friend's request for a warrant."

We do not consider Lt. Lillis to be a party to the proceedings to obtain a warrant for appellant's arrest for his probation violation. Appellant relies on a Black's Law Dictionary definition to argue that "parties to the hearing on a warrant application are the persons 'concerned or having or taking part in [the] affair, matter, transaction, or proceeding . . . .' (Black's Law Dictionary (6th ed. 1990) p. 1122.)" Appellant argues that the "party taking part in the warrant application was the Santa Cruz County Sheriff's

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concluded that the record indicated that the justice had allowed himself to "become a member, if not the leader, of the search party which was essentially a police operation." (*Lo-Ji, supra*, 442 U.S. at p. 327, 99 S.Ct. at p. 2324.) Surely, on this record, Judge Morse could not reasonably be considered to have become a member of the homicide investigation team for the Lopez murder.

Department, and Lt. Lillis, as the commander of the investigations division, was an 'officer' or 'director' of that party." This interpretation is at odds with the Penal Code definition that "The parties to a criminal action are the defendant and the People of the State of California." (Pen. Code, §§ 683-684.) Probation revocation proceedings are an extension of the criminal proceedings for the underlying conviction. (See generally *In re Coughlin* (1976) 16 Cal.3d 52.) The parties are those in the underlying proceeding for which the defendant was originally placed on probation. The original case, probation violation and ensuing warrant here are in the case of "The People of the State of California vs. Adrian Bejar Melgoza," Santa Cruz County Superior Court case number W7-02122. Lt. Lillis is neither a party to those proceedings nor an officer of a party.

Appellant contends, "the appearance of impropriety in this case was so substantial that suppression of evidence obtained as the result of Judge Morse's involvement in the case is warranted."

Appellant relies on *State ex rel. Brown v. Dietrick* (1994) 191 W.Va. 169 (444 S.E.2d 47). There, the magistrate who issued a search warrant was married to the chief-of-police of a small police force. The warrant was requested by another officer on the force, and the magistrate was on call after hours for emergency matters. On appeal, the court held that where the magistrate was not related to the requesting officer and had no contact with him except through the magistrate's system, and the magistrate stated that she made independent review of affidavit for search warrant, the warrant was not void. Appellant notes that here the warrant was sought telephonically in the afternoon, and Sgt. Deverell's connection to Lt. Lillis was both a social and professional one. However, Sgt. Deverell sought this warrant from the Watsonville judge because it was a probation violation on a Watsonville case. There is no evidence that Judge Morse herself ever socialized with Sgt. Deverell. Judge Morse's knowledge of any relationship between Sgt. Deverell's involvement in the homicide investigation and appellant's probation revocation proceedings has not been established nor is it susceptible to reasonable inference. Lt.

Lillis testified he did not discuss the homicide case with Judge Morse beyond referring to it as the "Kennedy Youth Center" case.

Appellant cites *Commonwealth v. Sharp* (Pa. Super. Ct. 1996) 683 A.2d 1219. In *Sharp*, the court found a search warrant lacked probable cause, and suppressed the fruits of the search. The court was also called upon to answer the following question: "Whether the searches of appellant's residence, outbuildings and school records violated the state and federal constitutions where the respective warrants were issued by the district justice whose husband, the county sheriff, actively participated in and directly supervised the drug investigation leading to the execution of the probable cause affidavit, which constitutes an actual conflict and/or appearance of a conflict of interest in violation of the Pennsylvania standards of conduct on district justices?" (*Id.* at p. 1221.) The court said the searches in question were proper. The court said that the issuing magistrate's status as spouse of the investigating officer did not create an actual or apparent conflict of interest rendering the search warrants defective. The court took into consideration that the location of this rural county presented problems in reaching the on-duty magistrate, that the magistrate's spouse was not the affiant, that issuance of the warrant was subject to further review by the Supreme Court, and that any judicial impropriety could be the subject of disciplinary action. Appellant argues here that because Sgt. Deverell could have called a different judge that afternoon when he discovered that Judge Morse was sitting in the Watsonville court, the reasoning of the *Sharp* court supports a finding of the appearance of impropriety here. We disagree, and find the appearance of a conflict of interest here to be even more remote, in that Sgt. Deverell was calling Judge Morse on a probation violation matter and not on the actual homicide case over which Lt. Lillis had some supervisory responsibility.

Appellant contends a person aware of the facts here might reasonably entertain a doubt that the judge would be able to be impartial. This argument assumes that a reasonable person would speculate that "Lt. Lillis' assignment of a close friend and

colleague to an important murder case is exactly the sort of information that he would have shared with his wife who presided over a courtroom that heard criminal cases." We disagree. Judge Morse may be expected to disclose her relationship with Lt. Lillis to a party appearing before her on a case involving sheriff's department personnel so that the party or counsel could have all information relevant for their consideration.[6] She may be expected to disqualify herself where she has personal knowledge of the disputed evidentiary facts or legal issues concerning the proceeding. A reasonable person might be concerned if Judge Morse were conducting a hearing on this homicide case itself, or if Lt. Lillis himself asked Judge Morse to issue the probation violation warrant. However, Sgt. Deverell seeking this arrest warrant would not inspire in a reasonable person doubts about Judge Morse's impartiality in the probation violation proceedings.

Although Sgt. Deverell was a subordinate of Lt. Lillis, and Lt. Lillis was ultimately responsible for the homicide case, appellant's argument necessarily attributes to Judge Morse knowledge of the link between the homicide case and the probation revocation matter, and, thus, a deliberate abandonment of her obligation to be impartial in an attempt to help her husband's career. This is simply too speculative to be convincing. Defense evidence concerning the 323 conditional sentence violations handled by Judge Morse during a six-month period further strengthens the conclusion that, given the sheer number of such cases before her, she would be unlikely to consider what tangential connections such a case might have with her husband's work. Nor do we believe that a reasonable person would doubt that Judge Morse could be impartial simply because her husband had gone skiing with Sgt. Deverell. Viewing the situation with the luxury of hindsight, Judge Morse may not have been the ideal choice of magistrate for Sgt. Deverell to contact regarding the arrest warrant for the probation violation. However,

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[6] The trial court noted that "Judge Morse does admonish defendants [t]hat she is married to the lieutenant, and if it is a Sheriff's case . . . ."

Judge Morse was the judge sitting in Watsonville, the matter in question was a Watsonville case, and Judge Morse had made orders in the same case for a probation violation earlier in the year. Her court was clearly the appropriate forum for the matter.

Considering all the circumstances, we cannot say that appellant was deprived of his right to a neutral and detached magistrate at the time of the issuance of the arrest warrant, or that in the ensuing probation revocation proceedings the situation was such to mandate recusal or create an appearance of impropriety sufficient to warrant suppression of the evidence.[7] Accordingly, no Fourth Amendment violation occurred and appellant was not denied due process of law.

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[7] Even if one were to equate a breach of Code of Civil Procedure section 170.1 and a constitutional violation of the neutral and detached magistrate requirement, the question remains whether application of the exclusionary rule to suppress the evidence obtained as a result of such a violation is the appropriate remedy. In *Leon*, the court noted, "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. . . . [T]here exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." (*Leon*, *supra*, 468 U.S. at p. 916.) If *Leon* 's good faith exception to the exclusionary rule does not apply to the type of violation of the neutrality requirement alleged here, suppression is mandated where a magistrate who issues an arrest or search warrant is not neutral and detached, irrespective of whether a reasonably well-trained police officer would or should know of this defect. This would lead to a strange result here because Sgt. Deverell could have bypassed seeking the arrest warrant from the court altogether. He or any other sheriff's department personnel were authorized by Penal Code section 1203.2 to arrest appellant for the conditional sentence violation without obtaining a warrant. Section 1203.2 provides in pertinent part: "At any time during the probationary period of a person released on probation under the care of a probation officer pursuant to this chapter, *or of a person released on conditional sentence* or summary probation not under the care of a probation officer, if any probation officer or *peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court* or the court may, in its discretion, issue a warrant for his or her rearrest."

HEARSAY EVIDENCE

Appellant contends his "constitutional rights to confrontation and due process of law were eclipsed by the sheer quantity of inadmissible hearsay which the court permitted the prosecution to introduce to prove his guilt." Appellant identifies three categories of such evidence admitted at trial. The first is "Mario Rodriguez's statements to Esmeralda Sanchez, Alma Pinon, and Detective Plageman that appellant was at a junta, had a gun and wanted to do a 'jale,' that he was the killer, and that referring to Esmeralda he said 'the bitch has to go down.' " The second is "Juan Macedo's statements to Inspector Raul Castellanos that he was a friend of appellant, that another gang member used a truck stolen by [Rafael] Shy Boy [Bernabe] to commit the homicide, that appellant was at the junta, and that [Macedo] did not want to say who the shooter was because the shooter was a friend of his." The third category is "Alejandro Ramirez' and Juan Macedo's statements to Inspector Castellanos that Ramirez threw a .25 caliber handgun into the lake because several of their friends were being arrested for a homicide, appellant was their friend, and that Ramirez did not want to get caught with the gun."

Mario Rodriguez's Statements

Appellant asserts that Rodriguez "was the most important witness in the prosecution's case. He was the only prosecution eyewitness to the events at the junta and appellant's participation at the junta who did not recant his testimony at trial." Appellant argues that Rodriguez's statement to Sanchez and Pinon identifying appellant as the killer "was the only statement given by a gang member witness which was not the subject of coercion or otherwise motivated by a promise of leniency."

Appellant moved to exclude statements that Rodriguez made to Sanchez and Pinon in the van in the shopping center parking lot. The trial court and counsel discussed the admissibility of these statements at length. The trial court ruled that Rodriguez's statements to Sanchez and Pinon were admissible for the non-hearsay purpose of proving Rodriguez's state of mind or motivation for telling the women that appellant was the

killer and had issued a threat against appellant's half-sister Sanchez, and as circumstantial evidence of appellant's identity as the killer. The trial court also allowed Det. Plageman to testify that he received a call from Sanchez's brother-in-law and, when he spoke to him and the two women, was given by them essentially the same information they said Rodriguez had given them.

The challenged statements made by Rodriguez were admitted after the trial court found that the prosecutor had used due diligence in attempting to locate him and that he was unavailable. During trial, after Rodriguez's statements were admitted into evidence but before the prosecution had completed its case-in-chief, Rodriguez was located and arrested. Defense counsel argued that the testimony concerning Rodriguez's statements should be stricken now that he was available as a witness.[8]

Once Rodriguez had been located, the prosecution resisted using him as a witness, asking "[W]hy does the Court feel that we have to call Mario Rodriguez?" The court ordered the prosecutor, as the proponent of Rodriguez's statements to the two women in the van, to produce him to testify now that he was available. The trial court ruled that the prosecution would have to call Rodriguez as a witness but the court allowed the prosecution to confine direct examination of Rodriguez to the statements he made to Sanchez and Pinon in the van, which had been admitted due to Rodriguez's unavailability. The trial court did not restrict appellant's cross-examination other than to confine it to the scope of this direct examination. (Evid. Code, § 761.) The court told the prosecutor to "restrict [Rodriguez's testimony] to the van statements." The court restricted defense counsel's cross-examination to "every statement in the van." Should the defense wish to elicit testimony beyond this, the court required that Rodriguez be called as a defense witness.

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[8] Defense counsel commented, "I think on appeal it's going to look like a terrible mess."

Appellant complains that the defense cross-examination of Rodriguez was improperly restricted because his testimony during the prosecution's case-in-chief was limited and the court, for the most part, would not allow leading questions once Rodriguez was called as a defense witness.

When called by the prosecution, Rodriguez confirmed that he told Sanchez and Pinon that at a junta the gang planned the shooting and that he saw appellant with a gun. He confirmed that he told Sanchez and Pinon that he saw both Sanchez and appellant at the Mona Lisa memorial. On cross-examination, he was impeached with some inconsistencies between his trial testimony and his testimony during prior proceedings. The defense then called Rodriguez as a defense witness, and undertook extensive questioning. Rodriguez testified at great length about the statements he made as well as the events at the junta, his own involvement in the PSW gang and the planning of the homicide, his immunity agreement, his drug use and capacity to observe and recollect, his biases, and his protective feelings toward certain other witnesses and gang members.

Defense counsel requested permission to ask Rodriguez leading questions. The trial court took a wait-and-see approach to this request, reviewing it periodically based on Rodriguez's response to questions. For example, at one point the trial court sustained a prosecution objection that Rodriguez's answer was non-responsive, and defense counsel asked "permission to lead the witness." The court said, "No. Not right now. I think he's trying to respond . . . ." Later, the court again declined to give defense counsel permission to lead, stating, "Well, so far he's been answering your questions properly, so not yet." However, when defense counsel was impeaching Rodriguez with inconsistencies based on his prior testimony and statements, the trial court permitted leading questions. Rodriguez was generally responsive to counsel's questions during the two days he appeared as a defense witness.

Evidence Code section 767, subdivision (a)(1), provides that leading questions "may not be asked of a witness on direct or redirect examination" except in "special

circumstances where the interests of justice otherwise require." Trial courts have broad discretion to decide when such special circumstances are present. (*People v. Williams* (1997) 16 Cal.4th 635, 672.) We see no abuse of discretion in the trial court's flexible and attentive approach to determining whether and when leading questions were appropriate during this witness's testimony.

Appellant objects to the introduction of Rodriguez's statements on confrontation grounds. Even assuming the statements were erroneously admitted, Rodriguez appeared in court and testified as to each of the challenged statements. The defense thoroughly cross-examined him about the challenged statements in the van, and conducted an extensive and probing direct examination of Rodriguez concerning all relevant aspects of the case. No confrontation violation occurred in either the admission of Rodriguez's out-of-court statements or the court's regulation of the questioning of this witness.

Detective Plageman's Testimony

Appellant contends the trial court erred in allowing Det. Plageman to testify concerning what Sanchez and Pinon told him Rodriguez told them in the van. The detective testified Sanchez disclosed her informant's identity, the suspect's name and his address. These statements were admitted as non-hearsay to explain the subsequent steps the detective took in the investigation, that is, as the reason the police searched appellant's residence. Det. Plageman was also permitted to testify that Rodriguez told him there was a junta with about 20 PSW gang members on August 23, and that Rodriguez said appellant told them he wanted to do a jale. Detective Plageman testified Rodriguez told him appellant displayed a .22 chrome handgun and said he wanted to use the truck Bernabe had stolen. The court permitted this testimony to rebut the suggestion of recent fabrication by Pinon. Pinon had not previously testified that Rodriguez named gang suspects, and defense questioning suggested she only remembered appellant's name after being prompted. This was the reason for admitting Sanchez's testimony concerning the disclosures in the van as well. Rodriguez himself testified at length about what he did

or did not say in the van to his half-sisters, thus dispelling any confrontation concerns raised by the admission of his statements.

Det. Plageman testified Rodriguez told him that Bernabe said he would wipe his fingerprints off the truck. Appellant objects to the admission of this testimony, and Det. Plageman's testimony concerning what Rodriguez told him appellant said at the junta, as "double hearsay."

Both Bernabe and Rodriguez were available and testified. Bernabe testified that he was not a PSW gang member and that he did not remember stealing the truck, telling gang members they could use it, or wiping it down for fingerprints. He denied that the letters of his tattoo of PSW stood for Poorside Watsonville. He said he did not remember what he told Det. Plageman or being interviewed by him. He testified he did not remember his testimony in a previous proceeding about the truck. Bernabe's statements to Rodriguez were admitted in response to the prosecutor's cross-examination of Det. Plageman concerning what Rodriguez had told him in his first interviews with sheriff's office personnel. Because the defense's direct examination was directed at the content of these interviews, the challenged statements were admissible pursuant to Evidence Code section 356. Evidence Code section 356 permits an adverse party to counter evidence of a "detached act, declaration, [or] conversation" with evidence of "any other act, declaration, conversation, or writing which is necessary to make [the detached act, declaration or conversation] understood . . . ." "The purpose of [section 356] is to prevent the use of selected aspects of a conversation, act, declaration or writing, so as to create a misleading impression on the subjects addressed." (*People v. Arias* (1996) 13 Cal.4th 92, 156.)

Juan Macedo's Statements to Detective Castellanos

Over strenuous objection by the prosecution, in part because "Juan Macedo is available and can testify," the defense called Det. Raul Castellanos to testify that when he interviewed Macedo on September 25, 1998, Macedo failed to list appellant's name as

being present at the August 23 junta. Det. Castellanos also testified that Macedo gave him information related to a gun in the possession of Michael "Shadow" Ramos, which prompted the detective to search Ramos's residence. The court admitted this testimony not for the truth, but "to show the conduct of the officer thereafter." On cross-examination, the prosecutor asked the detective what else he discussed with Macedo. Overruling a defense objection that this was beyond the scope of the direct examination, the trial court said, "I'm letting it come in. It's not for the truth. It's what was told to the officer. Both the People and the defense could have called Mr. Macedo in, had a lengthy cross-examination and direct. But it's not coming in for the truth. It's a report that was given to this officer. The defense had a purpose for doing this with regard to the officer's conduct."

The detective testified that Macedo said appellant was a friend of his and was at the junta. He testified Macedo told him "Bernabe used the stolen truck in the homicide." He testified, "Macedo [said] that another gang member used the truck for transportation to commit the homicide." He also testified Macedo was hesitant to name the shooter, but told the detective that a friend of Macedo's, a fellow gang member, had committed the homicide. On redirect, the defense established that although Det. Castellanos knew appellant was a suspect in the homicide, he did not include his name on the list of gang members Macedo said were at the junta.

Appellant argues, "It is clear from the questions asked that the prosecutor's purpose in introducing the aforementioned evidence was for the jury to infer that appellant was a friend of Macedo, the shooter, and that Macedo would not name him as the shooter."

It appears the court admitted the testimony concerning Macedo's statements to Det. Castellanos initially to explain the detective's actions and then pursuant to Evidence Code section 356. The first part of Macedo's statements, introduced by the defense, was not introduced for the truth and the trial court admitted the rest of Macedo's statement,

introduced by the prosecution on cross-examination, to make the first part understood. We find no error in the court's decision to admit this second part of Macedo's statement for the same purpose, to explain the detective's actions, and to rebut the implication about Macedo's list of names. We find no error in the court's limitation of the use of this evidence to reflect the same limitations on the use of the first part of the statement, rather than admitting either part for the truth.

Detective Castellanos's Testimony Concerning Juan Macedo's and Alejandro Ramirez's Statements About Disposal of the Gun

During the defense case, appellant presented evidence that the police searched Michael Ramos's house and found .25 caliber bullets. On rebuttal, the prosecution called Det. Castellanos to explain why the police conducted the search. This testimony included Alejandro Ramirez's and Juan Macedo's statements to Det. Castellanos that Ramirez threw a .25 caliber handgun into the lake because several of their friends were being arrested for a homicide, appellant was their friend, and that Ramirez did not want to get caught with the gun. The court told the jury that this evidence was coming in "not for the truth. Just to show the conduct of the officer later. So you're not to take what Mr. Macedo says to the officer as a fact." As to Alejandro "Baby" Ramirez's statement to Castellanos that Ramirez was a gang member with the moniker "Baby" and that he had the .25 caliber gun, the court told the jury these statements were declarations against his penal interest.

Appellant contends the prosecution misused these statements. He argues "The reason why Ramirez threw the gun in the lake, i.e., to protect himself from prosecution, was irrelevant to the issue of the police officers' motivations in searching Ramos' house for a weapon. The real purpose for the introduction of Macedo and Ramirez's out-of-court statements were for the truth-of-the-matter asserted that the murder weapon was thrown away to cover for their friends, and inferentially that the gun was thrown away to protect appellant who had admitted to Rocha that he was the shooter."

At a pretrial hearing regarding Ramirez's availability as a witness, counsel appeared for Ramirez and argued that he had an "ongoing Fifth Amendment privilege in this matter." Counsel acknowledged that Ramirez "was acquitted of the charges." However, counsel noted "the People have cast a much wider net at this stage of the proceedings." Counsel advised Ramirez to assert his privilege against self-incrimination when asked questions concerning the homicide because "[t]here are a number of collateral crimes that he was not charged with" including "conspiracy to commit gang crimes." The court sustained Ramirez's invocation of his Fifth Amendment privilege. The court later found Ramirez unavailable and his statements declarations against interest.

Det. Castellanos testified that Ramirez told him that he threw the .25 caliber handgun in the lake because "several of his gang member friends were being arrested regarding this case and he did not want to get caught with the gun." The court instructed the jury that this statement could be considered for its truth as a declaration against interest. The statement was potentially incriminating, as the trial court recognized in finding him unavailable upon assertion of his right against self-incrimination, because despite his acquittal of the murder charge, he potentially faced charges as a conspirator. No error occurred.

Due Process

Appellant contends "The state's introduction of inculpatory multiple hearsay so infected the trial with unfairness as to deprive appellant of due process of law." We note that Mario Rodriguez, Oscar "Blue Eyes" Macias and Juan Rocha, the three gang members whose statements implicated appellant in the homicide, all testified and were cross-examined. Rafael Bernabe and Juan "Happy" Fernandez, whose statements indirectly implicated appellant as being present at the junta, also testified and were cross-examined. Macedo's statements about the .25 caliber gun were not admitted for the truth.

Ramirez's statements, regarding possession of a gun that was not the murder weapon, were admitted as a declaration against penal interest. No due process error occurred.

OSCAR MACIAS'S STATEMENT AND THE VOICE STRESS ANALYZER

Appellant contends he "was deprived of due process of law by the admission of the involuntary pre-trial statements of third-party witness Oscar Macias and the admission of the voice stress analyzer test administered to Macias."

Proceedings Below

Oscar "Blue Eyes" Macias testified at trial under an immunity agreement barring his prosecution for being an accessory to murder. He testified he had been associated with the PSW gang for about two or three years, had many friends in the gang, but did not "hang around" with them anymore. He acknowledged getting a foot-long tattoo on his back that said "Poorside" after Lopez was killed. He said that in November 1998, Rafael "Shyboy" Bernabe was a good friend of his. He was also friends with Mario "Shaggy" Rodriguez , Juan "Happy" Fernandez, and appellant. He had known the homicide victim Lopez since junior high school. He testified he had never heard the term "being a rat." Macias testified he did see Bernabe with a pick-up truck, but he did not know the truck was going to be used in a drive-by shooting.

Macias testified he did not have a conversation with appellant on the railroad trestle near where the junta occurred. Macias testified appellant never told him he was going to do a drive-by. He acknowledged telling the investigative grand jury appellant told him he was going to do a drive-by, but said, "that was a lie." He told the grand jury what he did because "they wanted to hear that." He testified that investigating officers "pressured me to say what I said." Macias testified that, during his interview with the police, the officers physically stopped him from leaving the interview room. They frightened him into accusing appellant by talking to him about being an accessory to murder and being prosecuted for perjury. They told him he could be sent to state prison. He was addicted to heroin, he did not have a lawyer, and the police repeatedly raised their

voices at him. He lied to the investigators and the grand jury because he was scared "they would give me time. I didn't want to go to jail."

The court permitted the jury to watch the videotaped recording of Macias's interview with the police and Macias's statements were introduced as impeachment and as substantive evidence of appellant's guilt. The interview was conducted November 18, 1998, from about 9:20 p.m. to 10:45 p.m. Macias, accompanied by his parents, had just come from a grand jury appearance. As his parents waited outside, Macias agreed to take a voice stress analyzer test "to prove [he] was telling the truth" to the grand jury. Toward the end of the interview, Macias acknowledged to the officers that appellant had told him he was going to do a drive-by. Macias was then escorted from the interview room to the grand jury to testify. He returned to the interview room to confirm for the deputies that he had testified to appellant's involvement in the homicide.

Detective Joseph Hemingway conducted the interview assisted by various other deputies. During the interview, Det. Hemingway administered a voice stress analyzer test to Macias. The videotape of Macias's statements to the detectives shows the detectives using a briefcase-sized apparatus referred to by the parties as a voice stress analyzer. On the tape, the detective tells Macias he wants him to take a "Truth Verifications Test." The detective works out a set of questions with Macias, including one for which Macias is to give a deliberately false answer, and practices these questions with him before administering the test.[9] The detective then attaches a small microphone to Macias and asks the questions, including whether Macias knew what Bernabe was going to use the truck for and if Macias knew who killed Lopez. Macias asks the detective how the machine detects lies, and the detective explains, "[y]ou have an inaudible FM in your voice. That, people cannot disguise. And it's computer calibrated,

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[9] The detective says "So I'll say, 'Is the wall colored white?' and I want you to say, 'No.' "

adjusted. Most of the agencies across the United States are using it now. Because it's simple to use and it's very effective." The detective explains the machine cost almost $15,000 and is sold only to law enforcement. After the test, the detective leaves the interview room and returns saying, "The results are back. They're in. They're clear. And I don't think I need to tell you where it told us that you aren't being honest."

The detective asks Macias if he understands the terms "accessory" and "principal." The detective gives an example involving a bank robbery in which someone not actually involved in the robbery had knowledge about it beforehand but later denies knowing about it. The detective says, "That's perjury, first of all. Okay? When you go down in front of a jury or a hearing and you don't tell 'em the truth, that's called perjury. And that, that is, is a felony. Okay? They'll send you not to County Jail but to State Prison." Macias asks, "So, you're saying I'm an accessory right now." The detective tells him he "could be" and, if even more involved, he could be a principal. The detective then launches into a long discourse about how Macias's friends were "playing" him by letting him and others "go down for perjury" and serve prison sentences instead of having the "balls" to say "No . . . . I did it, man. You don't take out one of my friends for what I did." The detective discusses the pleasures of freedom in contrast to life in prison, and Macias's family's love for him.

After some banter about the truck, Macias appears subdued and then challenging to the detective. He asks, "how many guys do you have to take the test 'til you guys can get the truth?" When told "we have the truth," Macias asks, "why do you guys need to talk to me then . . . you already have the truth." Macias says he does not want to be a "rat." He says, "if that's a true friend you never tell on him." The detective suggests that victim Lopez was Macias's friend as well, and refers to Lopez's grieving family saying "what kind of friend are you?" Macias says, "Tell, tell me. You guys tell me. Tell me who it was and I'll say 'yes ' or 'no.' " The detective asks "Gonzo?" Macias says, "Alright. It was him." After more discussion of how Macias knew this, Macias leaves

the room to return to the grand jury. He returns and confirms he told the grand jury, "Gonzo told me they were gonna' do a drive by" and that Bernabe told him he was going to use the truck for a jale.

The trial court reviewed this videotape before ruling on a defense motion to exclude it. The trial court said, "with regard to that video, the coercion, if you want to call it – I didn't see any coercion to speak of in that." The court said, "I don't believe that there was undue pressure with regard to Mr. Macias in that. That's what investigators do. They do try to get a person to come forward with the truth as they see it. . . . They mentioned several times that he could be tried as either an accessory or a principal. [¶] Well, there's nothing unusual about that. . . . I did not see any undue coercion or pressure."

Macias's Statements

Appellant contends, "police coercion employed against Macias made his identification of appellant inherently unreliable." In *People v. Badgett* (1995) 10 Cal.4th 330, our Supreme Court stated the exclusion of coerced testimony of a third party "is based on the idea that coerced testimony is *inherently unreliable*, and that its admission therefore violates a defendant's right to a fair trial . . . ." (*Id*. at p. 347.) "[T]he primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings." (*Id.* at p. 347.) Here, appellant does not claim that Macias's actual testimony at trial, in which he stated he lied to the investigators, was coerced. Rather, he contends the evidence concerning Macias's inconsistent statements to the investigators and grand jury identifying appellant as the killer was the product of coercion. On appeal, we examine the entire record, including the videotape, and make an independent determination whether the videotaped statement by Macias was coerced in violation of appellant's right to a fair trial. (*Badgett, supra,* 10 Cal.4th at p. 352.)

Appellant relies on *People v. Lee* (2002) 95 Cal.App.4th 772, in which a conviction was reversed because the appellate court found a statement, admitted as a

prior inconsistent statement, was coerced and inherently unreliable. In *Lee,* the witness identified the defendant as the killer after a police interrogator told the witness that a polygraph test indicated that the witness himself was 97 percent likely to be the killer and, if the interrogator turned in the results of the test, the witness would be charged with first degree murder. The interrogator, and not the witness, had first brought up the defendant's name as the killer, and suggested the defendant had a motive for the killing. The witness recanted his identification the following day, and testified at trial that his statements to the interrogator were not true and that they had been made under duress. In reviewing the evidence, the appellate court concluded, "the police crossed the line between legitimate interrogation and the use of threats to establish a predetermined set of facts." (*Id.* at p. 786.)

As the court in *Lee* stated, "California Courts have long recognized it is sometimes necessary to use deception to get to the truth. [Citation.] Thus, the courts have held, a 'deception which produces a confession does not preclude admissibility of the confession *unless the deception is of such a nature to produce an untrue statement.*' [*People v. Watkins* (1970) 6 Cal.App.3d 119, 125.]" (*Lee, supra,* at p. 785, italics in original.)

We cannot say that the detectives here went beyond mere exhortations to tell the truth and legitimate threats of prosecution unless Macias came forward with evidence of what he knew about the drive-by. The detectives repeatedly told Macias that they wanted the truth. Macias told them they already had the truth, and explained he did not want to make a statement himself. On the videotape, Macias appears to struggle with his own code of ethics concerning loyalty to his friends as opposed to being impacted by the detective's comments on the pleasures of freedom. Toward the end of the interview, before identifying appellant as the killer, Macias becomes more assertive and sarcastic with the officers, rather than appearing intimidated or defeated. Unlike the interrogator in *Lee*, at no time do the detectives here threaten to charge Macias as Lopez's actual murderer if he does not reveal what he knows about the killing. The circumstances of his

questioning were not so coercive as to produce an untrue statement, and the admission of Macias's statements does not offend due process.

The Voice Stress Analyzer

Appellant contends, "the trial court erred in the admission of the results of Macias' voice stress analyzer examination." Before trial, the defense brought a motion to exclude evidence of voice stress analysis on the grounds that it did not meet the standard of general acceptance in the scientific community. The defense also argued that the admission of the voice stress analyzer was barred by Evidence Code section 351.1.[10] Appellant argues, "any mention of the test was prohibited under California case law and analogous authority. . . . All references to the V[oice] S[tress] A[nalyzer] test should have been excised from the videotaped interview and Detective Hemingway should have been prohibited from discussing the matter."

Before the videotape of Macias was played for the jury, defense counsel referred to the voice stress analyzer and said, "I do believe the only way this should come in is with the very clear limiting instruction that it is not coming in for the truth of the officer's conclusion that what Mr. Macias said in response to his questions and based on the analyzer it was a lie."

During Macias's testimony at trial, defense counsel cross-examined him about the circumstances of his interview with the detective and asked about the voice stress test.

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[10] Evidence Code section 351.1 provides "(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results. [¶] (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible."

The trial court overruled the prosecution's objection to defense counsel's question about whether the detective "never mentioned [to Macias] that they couldn't use that in court."

The court suggested, and the parties agreed, that before playing the videotape the court should instruct the jury as to the limited use of the voice stress analysis. The court instructed the jury, "you are going to see the use of the voice stress analyzer machine. You're to think of it in terms of this: This is used as a tool during interviews or interrogation by law enforcement. It's not going to be offered by the District Attorney as evidence for you to consider when you're deliberating the truth or falsity of whatever is said based on the machine. The only purpose for showing you this video is to see if it does impeach what Oscar Macias testified to yesterday. So you're not to pay any attention to the machine at all. It's not even gonna come in. Its [*sic*] just a tool that was used at this time."

During deliberations, the jurors asked, "Is there any part of the conversation on the Oscar Macias video that we should not consider? Unclear of how we should use video in deliberations." The foreperson said, "Some of us had the idea that we were only supposed to view that tape for the interviewee's demeanor and his attitude and not for the actual words that he said or the questions that he was asked, and we weren't sure about what that direction was."[11] In response, the jurors were given a written instruction that said, "The videotaped out of court interview of Oscar Macias was received in evidence to impeach, if it does, his sworn testimony. You may consider the substance of that interview for that purpose. Statements that he made that are consistent or inconsistent with his testimony may be considered for the truth of the statements themselves, but you,

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[11] This inquiry may have been a product of the prosecutor's questions in laying a foundation for the playing of the tape. He asked the detective if it was important for the jury to watch the video and not "get wed" to the transcript. He asked if "body language [was] apparent on the video" and the detective responded "apparent and very important" In response to defense objection, the court struck the words "very important."

the jury, are the ones to decide the weight, the meaning and the facts as to the witness and his testimony. The evidence is subject to the other applicable instructions read to you, with the following limiting instruction that you cannot consider the results of the voice stress analyzer as the truth."

Our review of the record leads us to conclude that the results of the voice stress analyzer were not admitted into evidence. Although the administration of the test and the detective's statements to Macias about the results are on the videotape of the interview, the jury was specifically instructed to disregard them. We presume the jurors followed these admonitions. (*People v. Harris* (1994) 9 Cal.4th 407, 430-431.) The administration of the test was so intertwined with the detective's interview that excising references to it on the videotape would not only have been impractical, it would have deprived appellant of the opportunity to present the full circumstances leading to Macias's statements incriminating appellant. No error occurred.

SENTENCING ISSUES

Penal Code Section 12022.53, Sudivisions (c), (d), and (e)

Appellant contends, "The enhancements under Penal Code sections 12022.53 (c), (d) & (e) must be stricken because they were not properly pled and proven, and also because the pleading failed to give the notice required by the due process clause." The prosecution pled that, for the benefit of a criminal street gang, appellant intentionally and personally discharged a firearm proximately causing great bodily injury or death, within the meanings of Penal Code sections 12022.53, subdivisions (b), (c) and (d) and 186.22, subdivision (b)(1). Appellant contends his due process right to notice was violated because the prosecution failed to plead a vicarious liability theory. He asks this court to strike for lack of proper notice the enhancements under section 12022.53, subdivisions (c), (d) and (e) for aiding and abetting the intentional and personal discharge of a firearm. Here, appellant was prosecuted under the theory that he was the shooter. The jury found true the charge that appellant himself intentionally and personally discharged a firearm

and caused great bodily injury. Thus, even assuming error, it was harmless under any standard.

Penal Code Section 12022.7

Appellant contends, "The enhancement for personal infliction of great bodily injury must be stricken as it does not apply to murder." By its express terms, Penal Code section 12022.7, an enhancement for the infliction of great bodily injury, does not apply to murder. (Pen. Code, § 12022.7, subd. (g).) At sentencing, the court did say, "Count 1, conviction of Penal Code Section 187(a), a felony, with Penal Code Section 12022.7, the Defendant is sentenced to mandatory sentence of 25 years to life in prison." However, no additional consecutive three-year term was imposed, and all other great bodily injury enhancements of other counts were stayed. Thus, there is nothing for this court to strike.

Penal Code Section 186.22

Appellant contends, "The two year term imposed for the [Penal Code] section 186.22 criminal gang activity enhancements in count 1 must be struck." Appellant's sentence of 25 years to life for his murder conviction was enhanced by the middle term of two years for the Penal Code section 186.22 gang enhancement. Section 186.22, subdivision (b)(1) provides for such an additional term upon the finding of a gang allegation "[e]xcept as provided in paragraphs (4) and (5)." Paragraph (5) provides "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." Appellant argues that because his murder offense was punished with a life term, paragraph (5), rather than Paragraph (1) applies.

Several cases have concluded that the enhancement under section 186.22, subdivision (b)(1) does not apply to counts carrying a life sentence. Instead, a true finding on a gang allegation affects the defendant's minimum parole eligibility as described by section 186.22, (b) (5), (formerly subdivision (b)(4)). (*People v. Johnson* (2003) 109 Cal.App.4th 1230; *People v. Harper* (2003) 109 Cal.App.4th 520; *People v.*

Herrera (1999) 70 Cal.App.4th 1456, 1465; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 485-486.) We agree with those cases and reject the contrary holding in the case cited by respondent, *People v. Herrera* (2001) 88 Cal.App.4th 1353. Although we recognize that the 15-year minimum parole eligibility has little effect since it is subsumed in the 25-year minimum parole eligibility imposed for the underlying murder conviction, the gang enhancement on count one must be deleted, and the judgments modified to instead provide that appellant may not be paroled until he has served a minimum of 15 calendar years under section 186.22, subdivision (b)(5).

DISPOSITION

The judgment is affirmed. The two-year gang enhancement imposed pursuant to Penal Code section 186.22 is ordered stricken and the abstract of judgment amended to reflect the striking of the enhancement and to reflect the 15-year minimum parole eligibility of section 186.22, subdivision (b)(5). The superior court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract to the Department of Corrections.

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ELIA, Acting P. J.

WE CONCUR:

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WUNDERLICH, J.

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MIHARA, J.